JD(NY)-16-17
Newark, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
NEW YORK BRANCH OFFICE
DIVISION OF JUDGES

ALAMEDA CENTER FOR REHABILITATION
AND HEALTHCARE, INC.

And

Case 22–CA–180564
22–CA–188462

1199 SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED HEALTHCARE WORKERS EAST,
NEW JERSEY

Saulo Santiago, Esq., of Newark, New Jersey
for the General Counsel.
David Jasinski, Esq., and
Rebecca Winkelstein, Esq., of Newark, New Jersey
for the Respondent.
William S. Massey, Esq., and
Jessica Harris, Esq. of New York, New York
for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in Newark, New Jersey, on March 28 and May 16, 2017 pursuant, to a complaint issued by Region 22 of the National Labor Relations Board (NLRB) on January 24, 2017.[1] The complaint alleges that Alameda Center for Rehabilitation and Healthcare, Inc. (Respondent) refused and failed to bargain with 1199 Service Employees International Union, United Healthcare Workers East, New Jersey (Union) as the exclusive collective-bargaining representative of the Respondent's employees in the Licensed Practical Nurses (LPN) Unit and refused and failed to withhold and contribute matching funds to the employees' 401(K) pension plan of Respondent's LPN unit (GC Exh. 1G) in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (Act).[2]

[1] At the conclusion of testimony on May 16, the counsel for the General Counsel was ambivalent as to whether to amend the complaint to include a second entity as a joint employer in Case No. 22–CA–180636. The hearing record remained open for the taking of additional testimony regarding the joint-employer status issue. It was not until July 21, 2017 that the parties reached a settlement agreement on Case No. 22–CA–180636, obviating the need to keep the record open. The settlement was approved and the hearing record closed by me on July 26, 2017.

[2] The exhibits for the General Counsel are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." The posthearing brief for the General Counsel is identified as "GC Br." The hearing transcript is referenced as "Tr."

On the entire record, including my assessment of the witnesses' credibility[3] and my observations of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the posthearing brief filed by the General Counsel (GC Br.), I make the following

FINDINGS OF FACT

I. JURISDICTION AND UNION STATUS

The Respondent, a domestic corporation, with an office and place of business located at 303 Elm Street, Perth Amboy, New Jersey has been engaged in the operation of a nursing home and rehabilitation center where it derived projected gross annual revenue in excess of $100,000 and purchased and received goods and materials valued in excess of $5000 at its Perth Amboy facility from suppliers outside the State of New Jersey during the last 12 months. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The 1199 Service Employees International Union, United Healthcare Workers East, New Jersey is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The counsel for the General Counsel states that prior to April 1, 2016,[4] AristaCare at Alameda (AristaCare), the predecessor employer, operated a nursing home and rehabilitation center located at 303 Elm Street, Perth Amboy, New Jersey. It is not disputed that the Union was recognized by AristaCare as the exclusive collective-bargaining representative of the non-professional employees (Non-Professional Unit) and of the LPN unit to include

> All regular full-time and regular part-time employees Licensed Practical Nurses ("LPN") employed by the Employer at its 303 Elm Street, Perth Amboy, New Jersey home, but excluding all other employees, temporary and per-diem employees, supervisors and guards, as defined in the National Labor Relations Act.

The LPN unit collective-bargaining agreement with the Union and AristaCare was effective from November 30, 2014 to September 30, 2017 (GC Exh. 3). About December 28, 2015, the Respondent entered into an Asset Purchase Agreement with AristaCare to acquire and continue to operate the Perth Amboy facility (GC Exh. 6). The counsel for AristaCare informed the Union on December 31, 2015 that the expected sale is expected to close on March 1, 2016 and that AristaCare had required the Buyer to retain all current bargaining unit employees and enter into status quo agreements with the Union on the non-professional and LPN units (GC Exh. 4).

a. The Respondent's Repudiation of the 401(K) Pension Plan

Article 31.1 of the collective-bargaining agreement between the Union and AristaCare (GC Exh. 3 at 26) states

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[3] Witnesses testifying at the hearing relative to the remaining issues in the consolidated complaint included David Jasinski, Esq., William S. Massey, Esq., and Abdulrasaq Akanbi.

[4] All dates are in 2016 unless otherwise indicated.

> Each employee who has completed at least one (1) years of continuous service and worked 1,000 hours the previous year shall be eligible to participate in the 401(k) Plan. Employer shall match 50% of each employee's contribution, up to a maximum of 3% of the employee's gross salary.

On February 8, the Union was informed by David Jasinski (Jasinski), Esq. that his office represents the Respondent and that, as the buyer of the facility, will fully comply with the terms of the CBA and maintain wages, benefits and conditions contained in the collective-bargaining agreement (GC Exh. 7). About February 11, the Union and the Respondent entered a status quo agreement (GC Exh. 9), which states

> Alameda agrees to fully comply with the terms of the Collective Bargaining Agreements ("CBAs") between AristaCare ("the Seller") and the Union, as extended and modified in subsequent Memoranda of Agreements ("MOAs"), covering a unit of non-professional employees and a unit of licensed practical nurses. To this end, Alameda agrees to maintain wages, benefits and conditions contained in the CBAs and retain all bargaining unit employees in both bargaining units.

William Massey, Esq. (Massey) testified that he represents the Union and was involved in drafting the status quo agreement. Massey defined a status quo agreement in which the buyer agreed not to set initial terms and agreed to leave things in place. He stated the Respondent further agreed to re-employ all members of the bargaining unit employees. Massey stated that the Union would have preferred an assumption agreement that would have required the Respondent to adopt or assume the entire collective-bargaining agreement between AristaCare and the Union (Tr. 24–25).

About May 2016, the Respondent notified the LPN bargaining unit employees that it was no longer withholding the employee's contribution to the 401(K) pension plan under Article 31.1 of the collective-bargaining agreement and will no longer match the employee contributions to the plan. Abdulrasaq Akanbi (Akanbi) was and is a LPN employed by the Respondent and had previously worked for AristaCare for 5 years. Akanbi testified that he had a 401(k) pension plan under AristaCare for one year and the appropriate deductions to the pension plan were made. When hired by the Respondent, Akanbi was told that his terms and conditions of employment would remain the same by a union representative. Akanbi was subsequently informed by Respondent's HR representative in April, after the facility was sold, that the new employer was no longer offering a 401(K) plan. Akanbi noted there were no longer any deductions taken from his paycheck for the pension plan and that his prior contributions were subsequently refunded to him (Tr. 128–134: GC Exhs. 27, 28, 30, 31).

Jasinski testified that the Respondent was forced to find a new pension plan provider after AristaCare had terminated the provider for the plan. Jasinski said that he communicated the termination of the plan and the efforts of the Respondent to search for a new provider to the Union through Massey. Jasinski does not deny that there was an obligation to provide a 401(K) plan to the LPN unit. Jasinski stated that the Respondent continued to search for a provider during the fall 2016 and found another provider effective January 1, 2017. Jasinski stated that the Union was subsequently informed that the 401(K) plan would be retroactive to April 20, 2016 and the Respondent agreed to match any catch-up contributions from the employees. Jasinski said that no employee provided any retroactive contributions to the plan. Jasinski stated that the Union did not file a grievance on the failure of the Respondent to withhold its matching contributions to the pension (Tr. 199–202, 205, 206; R Exh. 8).

Massey testified that there was an August 3 collective-bargaining session regarding the non-professional unit employees and the issue of the LPN 401(K) plan was raised. Massey stated that Jasinski conceded that the 401(K) plan was not implemented by the Respondent and repined to Massey that he had wished the issue would have been taken up in a grievance rather than an unfair labor practice charge with NLRB. Jasinski conceded that the plan was not implemented and the Respondent was working to implement an identical plan. Massey proposed that the Respondent make contributions to the 401(K) retroactive to April 20 (Tr. 94–97). Jasinski rejected the proposal since it would have been a windfall to the employees. According to Massey, Jasinski told him that the employer would be open to match any employee contributions retroactive to April 20 (Tr. 53–56).

b. The Respondent's Refusal to Bargain Over a New LPN Agreement

The purchase of the facility was delayed and the sale closed about April 21. On the same date, Massey emailed Jasinski and requested bargaining over the non-professional and LPN units and offered May 13 and 19 as possible bargaining dates. Jasinski responded that he would try to meet on May 19. There was no indication in Jasinski's email to Massey that his agreement to bargain was limited to the non-professional unit (GC Exh. 11).

The initial bargaining session occurred on May 13 and the Union offered a proposal for the non-professional bargaining unit. According to Massey, Jasinski responded that the proposal was "too rich" (Tr. 29–36).[5] Massey then attempted to present the Union's LPN proposal. Jasinski objected because he stated that the LPN contract would not expire until October 2017. The session ended and the parties continued to bargain over the next several months.

Jasinski testified that the primary focus of the bargaining sessions were about the service and maintenance agreement which had already expired in 2014 and any LPN discussions were considered by him as "ancillary discussions." Jasinski maintained that the Respondent made it clear to the Union that the LPN contract was still in full force and effect at the time of the new ownership. Jasinski recalled a conversation with Massey about February 8 in which he told Massey that the LPN contract was in ". . . full force and effect" with an expiration date of fall 2017 (Tr. 171–174).

In preparation for the next bargaining session on October 27, Christine Baggs, the executive assistant to Jasinski at the time (GC Exh. 25), sent the following email:

> On Thursday, October 27, we will continue to negotiate a new contract for service and maintenance personnel. On that date, we will also be prepared to negotiate a contract for the LPN unit. Since the parties engaged in bargaining for the LPN unit, we will continue utilizing the previous proposals submitted by the parties. Of course, this will be a separate negotiation and we will respond to the Union's previous proposal and take the negotiations for LPNs utilizing that previous proposal to hopefully move these negotiations forward and reach an amicable resolution for both contracts.

[5] The collective-bargaining agreement with the service and maintenance unit employees had expired on October 31, 2014 (GC Exh. 2). The predecessor and the Union extended the contract and the Respondent entered into bargaining with the Union once it assumed the predecessor's operations of the nursing facility. The parties subsequently reached a collective-bargaining agreement for the service and maintenance unit employees.

Jasinski testified that the Baggs email was sent in error and he had verbally contacted Massey that it was in error on October 27 by telephone or had reiterated that it was an error to Massey at the October 27 session (Tr. 212–214).

At the October 27 session, Massey attempted to offer a LPN proposal (GC Exh. 24) and was rejected by Jasinski, contending again that the LPN contract had not expired. Massey testified that he was taken by surprise since it was his understanding that the parties had agreed to bargain over both units.

Jasinski said at the October 27 session that the Respondent has an enforceable contract with the Union and that there were no reasons to bargain over another LPN contract. Jasinski said that the email was done in error by Braggs. Massey responded to Jasinski as to why the LPNs were not given their wage increase on October 1 if in fact, as contended by the Respondent, the LPN contract was fully in effect (GC Exh. 3 at 17). Massey testified that upon conferring with the Respondent's principals at the bargaining session, Jasinski replied that the LPNs would receive their wage increase effective October 1 as consistent with the LPN contract (Tr. 106–109, 207–212).

After the session, the parties agreed to bargain again on November 14. Massey's email to Jasinski on November 7 confirmed the next bargaining date and acknowledged that Jasinski stated to him that the email sent by Baggs was in error, but did not agree that it was actually sent in error (GC Exh. 25).

By letter date November 11, Jasinski replied that the parties will continue to work toward a collective-bargaining agreement with the service and maintenance unit but argued that there already exists a valid contract for the LPNs through October 31, 2017 (Tr. 61–68; GC Exh. 26). His letter to Massey, in part, stated

> It is disingenuous to suggest that a valid and enforceable collective bargaining agreement for the LPNs does not exist. The parties have consistently recognized and honored the existing collective bargaining agreement. In particular, we continued employment of all Union members and continued to deduct Union dues pursuant to the agreement. In addition, we implemented negotiated increases and followed the grievance and arbitration procedure. Indeed, on October 6th, the Union filed for arbitration pursuant to said procedure under the contract. We intend to continue to honor all of the terms of this agreement and we expect the Union to do the same.
>
> We welcome the negotiations for a new agreement for LPNs at the appropriate and legal time which is to commence ninety (90) days prior to the expiration of said agreement.

The parties met on November 14. Massey testified that he started with the subject of the LPNs and the employer's refusal to bargain over the LPNs. From the Union's point of view, Massey believed that the employer had "flip-flopped" on two occasions as to whether or not to bargain over the LPNs. Jasinski denied that there was any bargaining over the LPNs or a change of position by the employer. He maintained that the bargaining sessions dealt solely with the service and maintenance employees. He denied that his February 8 letter (GC Exh. 7) to Massey was indicative of the employer's wiliness to bargain over both units and that his April 22 email (GX Exh. 11) to Massey did not state one way or another that the employer was prepared to bargain over both units on May 19 (Tr. 215–218).

Massey asked Jasinski if the employer stood by his November 11 letter and was not going to bargain with the Union. Massey said that Jasinski responded that the Respondent was

standing by the November letter. Massey testified that Jasinski insisted that the Respondent assumed the contract of the LPNs. Massey countered that the status quo agreement was subject to bargaining. Since November 14, the parties have not bargained over a new contract for the LPNs (Tr. 68–71).

DISCUSSION AND ANALYSIS

The complaint alleges that Respondent refused and failed to bargain with the Union as the exclusive collective-bargaining representative of the Respondent's LPN unit employees and refused and failed to withhold employee contributions and contribute matching funds to the employees' 401(K) pension plan of Respondent's LPN unit in violation of Section 8(a)(5) and (1) of the Act.

a. The Respondent Failed and Refused to Bargain with the Union for a LPN Agreement

In *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), a successor employer must bargain with the employee representative when it becomes clear that the successor has hired its full complement of employees and that the union represents a majority of those employees. In *Burns*, the Court stated:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms.

The Board has held that when a business changes hands, the successor employer must take over and honor the collective-bargaining agreement negotiated by the predecessor. In *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987), the Supreme Court clarified the *Burns* doctrine and held that an employer that purchases the assets of another is required to recognize and bargain with a union representing the predecessor's employees when (1) there is a substantial continuity of operations after the takeover and (2) if a majority of the new employer's workforce in an appropriate unit consists of the predecessor's employees at a time when the successor has reached a substantial and representative complement.

The rule of successorship imposes an obligation on the Respondent to bargain with the union of its predecessor. *Fall River Dyeing*, 482 U.S. at 36. "If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of 8(a)(5) is activated. This makes sense when one considers that the employer intends to take advantage of the training work force of its predecessor." Id. At 41–42.

It is not seriously argued that the Respondent is not a *Burns* successor. Here, the Respondent hired all the LPN unit employees of its predecessor and substantially continued the same operations of the predecessor after the takeover. As such, I find that the Respondent is a perfectly clear *Burns* successor. The only remaining issue is whether there was an obligation to bargain with the Union for a new LPN contract.

A close review of the status quo agreement between the parties shows that Respondent only agreed to maintain wages, benefits and conditions contained in the CBAs for both bargaining units. The status quo agreement did not assume the agreement for the LPNs. Massey testified that the Union would have preferred that there was an assumption of the

predecessor's LPN contract with the Union. As such, it was his understanding in drafting the status quo agreement with the Respondent that the parties would need to bargain over a new contract.

With regard to the allegation that the Respondent failed and refused to bargain for a new contract for the LPN unit employees, the Respondent raised three areas that demonstrated to the Union that they were operating with an enforceable LPN contract under AristaCare. First, the Respondent contends that the LPN was scheduled for a wage increase on October 1, 2016. At the bargaining session on October 27, Massey raised the issue that the LPNs did not receive their wage increase. Jasinski stated that upon review, the employer believed that was an oversight and the wage increase was paid to the LPNs. Jasinski said that no grievance was filed because Respondent paid the increase. Second, Respondent argues that deducting union dues is also a clear indication that the LPN contract was still in effect. Third, the Respondent contends that the Union filed a grievance and demanded arbitration pursuant to the LPN contract when a LPN was terminated by the Respondent as further evidence that the contract was in full effect (Tr. 223–226).

I find that Massey credibly testified to the Union's intent with regard to the wage increase. As the labor attorney for the Union, Massey would be incumbent to ask the Respondent about the October 1 wage increase since it would have benefited the LPN unit employees. I would note that a grievance was not filed when the Respondent failed to implement a wage increase on October 1. Similarly, it would be incumbent on Massey to file a grievance and demand arbitration on the discharged LPN because, as he testified, there was "…nothing to lose. Either the Employer agrees to arbitrate, in which case we have a chance to get her job back, or they refuse to arbitrate, in which case we haven't lose anything" (Tr. 111). Finally, I find little significance with regard to the deduction of union dues as indicative of a LPN contract still in effect. The status quo agreement required the Respondent to maintain wages, benefits and conditions contained in the CBA. As such, the Respondent would have been required to continue deducting the union dues, and obviously, there would be no reason for the Union to complain that it was still receiving dues from the employer.

Even if the language in the status quo agreement was ambiguous, the clear record shows the Respondent's intent to bargain for a new LPN contract with the Union. While Massey admittedly indicated that the Respondent "flip-flopped" its position as to whether to negotiate or not with the Union for a LPN contract, I find that the clear intent of the Respondent was to bargain over both units. First, Massey's email of April 21 stated that the Union was prepared to bargain for "…both bargaining units at the same time/table." Jasinski's response in his April 22 email was only to confirm the date for the bargaining session. While Jasinski testified that his email did not state one way or another as to the Respondent's position on bargaining over the LPN contract, his email failed to affirmatively object to bargaining over the LPNs and thereby mistakenly led the Union to believe that the Respondent was ready to bargain over both units at the first session (GC Exh.11). Second, the email on October 24 from Christine Baggs, the executive assistant to Jasinski, also demonstrated the Respondent's intent to bargain over a LPN contract. The email stated that we are "…also prepared to negotiate for the LPN unit. Since the parties engaged in bargaining for the LPN unit, we will continue utilizing the previous proposals submitted by the parties." In my opinion, Baggs, whose title is more than a mere clerk, clearly drafted the email consistent with discussions she had with Jasinski. There has been no testimony provided that Baggs acted in a vacuum or had independently prepared the email on her own volition and contrary to the purported position of the Respondent not to bargain over a LPN contract. Clearly, from her email, Baggs knew that the Respondent had considered the previous proposals submitted by the Union on the LPN unit employees and either Jasinski or a Respondent principal had to inform Baggs that Respondent will continue to

utilize the previous proposals.

Accordingly, I find that the Respondent refused and failed to bargain with 1199 SEIU as the exclusive bargaining representative for the LPN unit employees described above violated Section 8(a)(5) and (1) of the Act.

b. The Respondent Unilaterally Changed the Pension Plan of the LPN unit employees

With regard to the allegation that the Respondent repudiated the LPN employees' pension plan, the Respondent maintains that it was forced to find a new pension plan provider after AristaCare terminated the provider for the plan. Jasinski said that he communicated the termination of the plan and the efforts to find a new provider to Massey. Jasinski does not deny that there was an obligation to provide a 401(K) plan to the LPN unit. Jasinski stated that the Respondent continued to search for a provider during the fall 2016 and found another provider effective January 1, 2017.

An employer violates Section 8(a)(5) and (1) of the Act if it change the wages, hours, or terms and conditions of employment of represented employees without providing the Union with prior notice and an opportunity to bargain over such changes. See *NLRB v. Katz*, 369 U.S. 736, 743–747 (1962). Under Board law, the Respondent was under a legal obligation to provide notice to the Union and an opportunity to bargain over any planned changes in the terms and conditions of employment of the unit employees. The implementation of unilateral changes by the Respondent of a mandatory subject for bargaining affects the terms and conditions of employment of the unit employees in violation of Section 8(a)(5) and (1) of the Act. *Proven St. Joseph*, supra; *Champion Parts Rebuilders*, 260 NLRB 731, 733–734 (1982).

In a unilateral-change case, "the relevant inquiry . . . is whether any established employment term on a mandatory subject of bargaining has been unilaterally changed." *Daily News of Los Angeles v. NLRB*, 73 F.3d 406, 411 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997). An unlawful unilateral change "frustrates the objectives of Section 8(a)(5)," because such a change "'minimizes the influence of organized bargaining' and emphasizes to the employees 'that there is no necessity for a collective bargaining agent.'" *Pleasantview Nursing Home v. NLRB*, 351 F.3d 747, 755 (6th Cir. 2003) (quoting *Katz*, supra at 744, and *Loral Defense Systems-Akron v. NLRB,* 200 F.3d 436, 449 (6th Cir. 1999)); *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993).[6]

While I fully appreciate that the pension provider was eliminated by the predecessor when Respondent assumed operations of the nursing facility, there is nevertheless no reason as to why the Respondent could not inform and bargain with the Union over its unilateral refusal to accept employee contributions and provide matching contributions to the plan. I credit the testimony of Akanbi, who testified that he was first informed that the Respondent repudiated the

[6] "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *Katz*, supra at 747. "'The vice involved in [a unilateral change] is that the employer has *changed* the existing conditions of employment. It is this *change* which is prohibited and which forms the basis of the unfair labor practice charge.'" *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (Board's brackets) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enfd. 73 F.3d 406 (D.C. Cir. 1996), cert. denied 519 U.S. 1090 (1997).

pension plan when it was no longer accepting his contributions and was not providing matching contributions to the plan. Massey credibly testified that the Union was informed after the plan was repudiated and that there was never an offer to bargain over this change.

It is now axiomatic that employers must bargain with the collective-bargaining representative of its employees regarding significant, material changes of their wages, hours or working conditions before changing the status quo. *Katz,* above. The foregoing change in the pension plan for the LPN unit affected employee terms and conditions of employment and was, thus, a mandatory subject of bargaining. See *Mid-Continent Concrete*, 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002) (health insurance); *Desert Toyota*, 346 NLRB 132 (2005), citing *Abernathy Excavating, Inc.*, 313 NLRB 68 (1993) (regularly scheduled pay dates); *Migali Industries*, 285 NLRB 820, 825–826 (1987) (vacation scheduling); *E. I. du Pont & Co*., 346 NLRB 553, 579 (2006) (severance pay).

Accordingly, I find that the Respondent violated Section 8(5) and (1) of the Act whenunilateral changes were made to the LPN unit employees without first providing notice and an opportunity to bargain with the Union over the changes in the terms and conditions of employment of the unit employees and refused and failed to withhold the unit employees' contributions and make matching contributions to the 401(K) pension plan.[7]

CONCLUSIONS OF LAW

1. The Respondent, Alameda Center for Rehabilitation and Healthcare, LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, 1199 Service Employees International Union, United Healthcare Workers East, New Jersey (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and at all material times, has been the exclusive collective-bargaining representative for the following appropriate unit:

   All regular full-time and regular part-time employees Licensed Practical Nurses ("LPN") employed by the Employer at its 303 Elm Street, Perth Amboy, New Jersey home, but excluding all other employees, temporary and per-diem employees, supervisors and guards, as defined in the National Labor Relations Act.

4. The Respondent failed and refused to bargain with the Union as the exclusive collective-bargaining representative of the LPN unit, above, in violation of Section 8(a)(5) and (1)

[7] The counsel for the General Counsel argues that the Respondent should be held liable for the employees' contributions as well as its own matching contributions to the plan. It is maintained that the Board has held that an employer's failure to implement the 401(K) plan is obligated to pay the employees' share as well as the matching contributions in addition to any lost interest and other reimbursable expenses. However, as also stated by the counsel for the General Counsel, this issue is "…normally addressed at a compliance hearing…" (GC Br. at 21, 22). Consequently, since the issue as to whether the Respondent is obligated to reimburse the unit employees with both their contributions and its own matching share, including lost interest, was not fully litigated at the hearing, I would leave that issue to be addressed at a compliance proceeding.

of the Act.

5. The Respondent repudiated and failed to bargain with the Union regarding the unilateral termination of the LPN 401(K) pension plan in violation of Section 8(a)(5) and (1) of the Act.

6. The Respondent failed to withhold employee contributions and to make matching funds to the LPN 401(K) pension plan in violation of Section 8(a)(5) and (1) of the Act.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

8. The Respondent did not otherwise violate the Act in the amended complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent will be ordered, on request, to bargain with the 1199 SEIU United Healthcare Workers East New Jersey as the exclusive bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

It is recommended that Respondent immediately rescind the unilateral repudiation of the LPN unit employee 401(K) pension plan and, upon request, bargain with the Union on the 401(K) pension plan for the unit employees.

It is further recommended that the Respondent immediately, upon request of the Union, resume withholding 401(K) pension contributions of the LPN unit employees and make matching 401(K) funds to their contributions.

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Alameda Center for Rehabilitation and Healthcare, LLC, its officers, agents, successors, and assigns, shall

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing and refusing to bargain with 1199 SEIU United Healthcare Workers East New Jersey as the exclusive bargaining representative of the LPN unit employees with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document:

All regular full-time and regular part-time employees Licensed Practical Nurses ("LPN") employed by the Employer at its 303 Elm Street, Perth Amboy, New Jersey home, but excluding all other employees, temporary and per-diem employees, supervisors and guards, as defined in the National Labor Relations Act.

(b) Failing and refusing to bargain with the Union over the unilateral change in the LPN unit 401(k) pension plan.

(c) Failing and refusing to withhold 401(K) pension plan contributions from the LPN unit employees, defined above, and failing and refusing to make matching 401(K) contributions to the plan.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with 1199 SEIU as the exclusive collective-bargaining representative of the unit employees, defined above, concerning wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

(b) Upon request, bargain with the Union regarding the unilateral repudiation of the LPN unit employees' 401(K) pension plan and, on request of the Union, withhold the LPN unit employees' contributions to the plan and make matching 401(K) pension contributions.

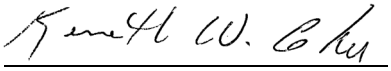
(c) Within 14 days after service by the Region, post at its existing property at the 303 Elm Street, Perth Amboy, New Jersey facility, a copy of the attached notice marked "Appendix".[9] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

copy of the notice to all current employees and former employees employed by the Respondent at any time since July 19, 2016 (date of the first NLRB charge in the complaint).

(d) Within 21 days after service by the Region, file with the Regional Director for Region 22, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 26, 2017



Kenneth W. Chu
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to bargain with the 1199 SEIU United Healthcare Workers East New Jersey (the Union) concerning wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All regular full-time and regular part-time employees Licensed Practical Nurses ("LPN") employed by the Employer at its 303 Elm Street, Perth Amboy, New Jersey home, but excluding all other employees, temporary and per-diem employees, supervisors and guards, as defined in the National Labor Relations Act.

WE WILL NOT refuse and fail to withhold the 401(K) contributions and refuse and fail to make matching contributions to the pension plan of LPN unit employees, as defined above.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, collectively bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the LPN bargaining unit.

WE WILL, on request of the Union, withhold LPN unit employees' contributions to the 401(K) pension plan and to make matching contributions to the plan.

Alameda Center for Rehabilitation and HealthCare, LLC
(Employer)

Dated_____By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102
Hours of Operation: 8:30 a.m. to 5 p.m.
973–645–2100

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-180564 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (862) 229-7055.